COMMONWEALTH OF KENTUCKY
SUPREME COURT
CASE NO. 2014-SC-000168

PURDUE PHARMA L.P.,
PURDUE PHARMA INC.,
THE PURDUE FREDERICK COMPANY, INC. d/b/a
THE PURDUE FREDERICK COMPANY,
PURDUE PHARMACEUTICALS, L.P., and
THE P.F. LABORATORIES, INC. — APPELLANTS

v.

On Appeal from Court of Appeals
Case No. 2013-CA-001941-OA

HON. STEVEN D. COMBS,
Pike Circuit Court, Division II — APPELLEE

COMMONWEALTH OF KENTUCKY, *ex rel.*
JACK CONWAY, ATTORNEY GENERAL — APPELLEE/REAL PARTY IN INTEREST
Plaintiff in Civil Action No. 07-CI-01303

BRIEF OF APPELLANTS

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I hereby certify that a copy of this brief was served by U.S. Mail, first class, postage prepaid, addressed to Attorney General Jack Conway, Sean J. Riley, Robyn Bender, Mitchel Denham, and Clay A. Barkley, Office of the Attorney General, 700 Capital Avenue, Suite 118, Frankfort, Kentucky 40601; Michael E. Brooks, C. David Johnstone, LeeAnne Applegate, S. Travis Mayo, and John L. McBrayer, Office of the Attorney General, 1024 Capitol Center Drive, Suite 200, Frankfort, Kentucky 40601; Donald L. Smith, Jr., Pruitt de Bourbon Law Firm, 226 2nd Street, Pikeville, Kentucky 41501; Honorable Steven D. Combs, Pike Circuit Court, 175 Main Street, Pikeville, Kentucky 41501; and Samuel P. Givens, Jr., Clerk of the Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601, on this 25th day of April, 2014.

James E. Keller

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INTRODUCTION

This original writ proceeding challenges: (1) an order deeming requests for admissions admitted on the basis of a missed "deadline" found nowhere in the Civil Rules and without giving the Purdue[1] petitioners/appellants notice or an opportunity to be heard; and (2) an order summarily denying Purdue's CR 36.02 motion to withdraw or amend the deemed admissions, even though the appellee Commonwealth of Kentucky suffered no prejudice during the short period between the allegedly missed deadline and the date Purdue filed its actual responses. Although the Court of Appeals found the circumstances here so "compelling" that it "would be inclined" to grant a writ, it mistakenly believed it lacked the authority to do so under Kentucky precedent, and it instead deferred to and invited this Court to exercise its superior power and duty under the Kentucky Constitution to ensure justice by providing relief. (App. A, Feb. 28, 2014 Op. and Order at 9, 12-13.)

STATEMENT CONCERNING ORAL ARGUMENT

Purdue respectfully requests oral argument. The Court of Appeals took the unusual step of requesting oral argument on its own initiative in this extraordinary original action for a writ. Purdue believes oral argument will be of similar assistance to this Court's understanding of the injustice and harm to orderly judicial administration posed by the Circuit Court's orders and the inadequacy of post-judgment appeal.

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[1] Purdue Pharma L.P. (individually, and as successor in interest to The Purdue Pharma Company), Purdue Pharma Inc., The Purdue Frederick Company, Inc. d/b/a The Purdue Frederick Company, Purdue Pharmaceuticals, L.P., and The P. F. Laboratories, Inc. (collectively, "Purdue"). Co-defendants Abbott Laboratories and Abbott Laboratories, Inc. are collectively referred to herein as "Abbott."

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

The facts that the Court of Appeals found so "compelling" that it would have issued a writ if it "were writing on a clean slate" are set forth below. (App. A, Feb. 28, 2014 Op. and Order ("2/28/14 Op.") at 9, 12-13; *id.* at 2-4 (facts and procedural history).)

A. The Commonwealth and Pike County File the Underlying Action and Concurrently Serve Requests For Admissions

On October 4, 2007, the Commonwealth of Kentucky and Pike County (on behalf of itself and a putative class of all Kentucky counties) filed the underlying case in Pike Circuit Court.[2] The Commonwealth alleged that Purdue and Abbott's marketing and promotion of OxyContin® Tablets ("OxyContin") caused it various forms of damage, including allegedly "excessive" spending on OxyContin through Medicaid. (Ex. 3, Compl.) It also pleaded a novel "public nuisance" claim to recoup the "massive sums" it allegedly spent diagnosing and treating OxyContin addiction and abuse, combating crime allegedly attributable to OxyContin abuse and diversion, and providing other public services. (*Id.* ¶¶ 100-06.) At the same time they commenced the action, the plaintiffs served requests for admissions and other discovery on Purdue and Abbott.

In the requests for admissions, the Commonwealth re-asserted many of the same allegations contained in the complaint, including issues relating to causation:

- "**ADMISSION NO. 17:** That the misrepresentations and/or omissions by Defendant ***caused*** OxyContin to be excessively overprescribed";
- "**ADMISSION NO. 18:** That the misrepresentations and/or omissions by Defendant ***caused*** damage to the Plaintiff, Commonwealth of Kentucky, by ***causing*** it to expend excessive amounts of money on OxyContin through state-funded benefits"; and

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[2] Six days later, the plaintiffs filed an amended complaint deleting all allegations concerning the putative class of Kentucky counties. (Ex. 4, First Am. Compl.) Pike County later settled and dismissed its claims with prejudice in June 2013.

- "**ADMISSION NO. 19:** That the misrepresentations and/or omissions by Defendant ***caused*** Plaintiff, Pike County, for itself and for all other Kentucky counties similarly situated, to expend excessive amounts of money to combat OxyContin abuse and diversion."[3]

(App. D, Plfs.' Requests for Admissions (emphasis added).)

B. Purdue Removes the Case; Informs the Commonwealth the Requests Must be Re-served After Removal; and Files Answers to the Complaint Denying the Substance of the Requests for Admissions

On October 29, 2007, Purdue removed the case to federal court before the time to answer either the complaint or the requests for admissions had expired. All parties agree that, upon removal, the requests for admissions became ineffective under the federal rules and required no response. (*See* Ex. 6, Sept. 25, 2013 Hrg. Tr. at 35 (Commonwealth: "They're correct that we don't dispute that we couldn't enforce the admissions in federal court. No one disputes that."); Ex. 7, Com.'s Reply on Mot. to Deem Admitted at 2 (same).) To confirm that the plaintiffs did not disagree, Purdue wrote the plaintiffs a letter right after removing the case to express the position that the pre-removal discovery requests "must be re-served" after the Rule 26(f) conference if the plaintiffs wanted responses. (Ex. 8, Oct. 30, 2007 Famularo Letter.) The plaintiffs did not respond to that letter. Under the circumstances, if the plaintiffs wanted responses to the nullified requests, they would have to re-serve them, which they never did.

Also on October 29, 2007, Purdue answered the amended complaint and denied allegations substantively identical to those in the requests for admissions, including that Purdue's alleged conduct caused damage to the plaintiffs or otherwise entitled them to relief under any of their causes of action. (*See, e.g.*, Ex. 10, Purdue Answers.) To give

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[3] As the Court of Appeals implicitly recognized, Admission No. 19, which applies only to Pike County, lost its relevance once Pike County settled and dismissed its claims. (*See* App. A, 2/28/14 Op. at 3 (listing "requests most damaging to Purdue's defense").)

just one of many examples, Purdue denied the allegation that the Commonwealth "spends millions of dollars each year to pay for excessive prescription costs" and other costs as a "consequence of Defendants' conduct." (*Id.* ¶ 3 and First Am. Compl. ¶ 3; *see also, e.g.*, Answers ¶¶ 68, 84-88, 91, 94, 96-98, 100-02, 109-10, 112, 114, 115-18, 122, 131-32, 136, 144, 155, 158, 163 and corresponding paragraphs of First Am. Compl.) As Purdue's answers to the complaint were filed ***after*** receipt of the requests for admissions, the Commonwealth ***has been aware since October 29, 2007 that Purdue denies the very allegations the Commonwealth now claims to have been admitted.***

C. The Case is Transferred to a Federal Antitrust MDL and, After Being Stayed for Several Years, is Remanded to Pike Circuit Court

Soon after removing the case, Purdue sought transfer to the Southern District of New York for inclusion in multidistrict litigation involving antitrust claims against Purdue. Over the Commonwealth's objection, the Judicial Panel on Multidistrict Litigation granted transfer because the Commonwealth's complaint included an "Antitrust" count similar to those already pending in the MDL. *In re OxyContin Antitrust Litig.*, 542 F. Supp. 2d 1359, 1360 (J.P.M.L. 2008); (*see* First Am. Compl. ¶¶ 123-29). Immediately after transfer in April 2008, the transferee court stayed the case for several years. In 2011, the parties jointly asked the court to lift the stay for the limited purpose of determining jurisdiction. (Ex. 11, Mar. 11, 2011 Letter.) The MDL court agreed and, after additional briefing, granted the Commonwealth's motion to remand. *In re OxyContin Litig.*, 821 F. Supp. 2d 591 (S.D.N.Y. 2011). Purdue then sought leave to appeal the remand order and moved to stay the order pending appeal. The Second Circuit Court of Appeals granted a stay, but ultimately denied Purdue's petition for appeal in

January 2013. *Purdue Pharma L.P. v. Com. of Kentucky*, 704 F.3d 208 (2d Cir. 2013). The Pike Circuit Court received the case back on February 8, 2013.

D. The Commonwealth First Notifies Purdue of Its Position That the Time for Responding to the Requests for Admissions Had Restarted and Elapsed By Filing a Motion to Have the Requests Deemed Admitted

As soon as the case returned to Pike Circuit Court, Purdue attempted to discuss with the Commonwealth a scheduling order setting discovery and other pretrial deadlines. (*See* Ex. 12, Feb. 8, 2013 Danford E-mail; Ex. 13, Feb. 15, 2013 Danford E-mail and attached proposed Agreed Scheduling Order.) The Commonwealth responded that it was "not prepared to agree to a scheduling order at this point and prefer[red] to meet and confer on such an order after a status conference with [Pike Circuit] Judge Combs." (Ex. 16, Feb. 15, 2013 Riley E-mail (emphasis in original).) The Commonwealth also proposed deferring that status conference until after another motion Purdue had filed in Franklin Circuit Court, relating to the Commonwealth's prior lawsuit against Purdue, had been addressed.[4] (*Id.*) Purdue agreed. (Ex. 17, Feb. 18, 2013 Danford E-mail.) The Commonwealth made no mention of its prior requests for admissions.

For the reasons set forth above, Purdue did not contemplate the earlier requests again after it wrote the Commonwealth in October 2007 to convey that the requests would have to be re-served after a Rule 26(f) conference to be effective. Nor did Purdue consider after the case returned to Pike Circuit Court the possibility that the requests might regenerate automatically upon remand, without any effort on the Commonwealth's part and without notice to Purdue. Purdue, therefore, was surprised when it received the

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[4] The Franklin Circuit Court did not rule on Purdue's motion until August 28, 2013.

Commonwealth's March 29, 2013 motion to have the requests for admissions deemed admitted. (Ex. 18, Mot. to Deem Admitted.)

E. The Circuit Court Grants the Commonwealth's Motion to Deem Admitted Before Purdue Receives Notice or Has an Opportunity to Respond

On April 1, 2013, the Circuit Court granted the Commonwealth's motion to deem the requests admitted, just three days after the motion was filed and the same day Purdue learned of the motion from receipt of its service copy. (App. B, Apr. 1, 2013 Order.) Although the requests had not been re-served and Purdue had strong arguments that the requests had not re-activated spontaneously after remand, Purdue never had a chance to be heard before the Circuit Court deemed the requests admitted.

F. Purdue Immediately Moves to Rescind the Order Deeming the Requests Admitted, Files Its Actual Responses to the Requests, and Seeks Leave to Withdraw or Amend Any Deemed Admissions Under CR 36.02

On April 4, 2013, the day it received and first learned of the Circuit Court's April 1, 2013 order, Purdue, along with Abbott, immediately moved to rescind it. (Ex. 19, Dfts.' Mot. to Rescind Order.) Purdue also filed its responses to the requests for admissions on April 12, 2013 – 11 days after Purdue learned about the motion – eliminating any remote possibility that the Commonwealth could be prejudiced by justifiably relying on any deemed admissions.[5] (App. E, Purdue's RFA Resp.) No material events occurred, and the Commonwealth took no action in reliance on the purportedly deemed admissions, between the supposed response deadline sometime in February or March 2013 (the Commonwealth and Circuit Court never identified a specific due date) and the time Purdue filed its actual responses on April 12, 2013. Indeed, the Attorney General conceded before the Court of Appeals that "it's difficult to

[5] Abbott filed its responses on April 17, 2013. (Ex. 21, Abbott's RFA Answers.)

say exactly and pinpoint what the prejudice was" during the brief interim period before Purdue filed its responses. (App. F, 2/11/14 Oral Arg. Tr. at 29, VR 09:29:13-09:29:31.) He admitted he "can't say that in 11 days that, okay, that all of a sudden there's this insurmountable prejudice" to the Commonwealth. (*Id.* at 30, VR 09:29:47-09:30:07.)

On April 15, 2013, the Commonwealth sent letters to the chairmen of two law firms representing Purdue opining that the alleged "failure to timely respond" to the requests for admissions "constitutes a possible basis for a legal malpractice claim by your clients" and "advis[ing] [the firm chairmen] to communicate this error to [their] clients and to place [their] legal malpractice insurer[s] on notice of a potential claim." (*See, e.g.*, Ex. 22, April 15, 2013 Riley Letter to Sagan and Famularo.)

On April 29, 2013, Purdue filed its opposition to the Commonwealth's motion to deem admitted and an alternative motion to withdraw or amend any deemed admissions pursuant to CR 36.02 and to substitute the actual responses that it already had filed. (Ex. 23, Purdue's Resp. to Mot. to Deem Admitted and CR 36.02 Mot.) On May 1, 2013, Abbott filed an opposition and alternative motion, making essentially the same arguments. (Ex. 24, Abbott's Resp. to Mot. to Deem Admitted and CR 36.02 Mot.)

G. The Circuit Court Summarily Denies Purdue's Motions Yet, Inexplicably, Grants Abbott's Motions on the Same Facts and Arguments

The Circuit Court heard oral argument on the issues related to the requests for admissions on September 25, 2013. The Circuit Court asked no questions and made no findings or ruling at the hearing. (*See* Ex. 6, Sept. 25, 2013 Hrg. Tr.) Later that same day, the Circuit Court entered the following order, set forth in its entirety:

> This cause coming before the Court on the Defendants' Motions to Vacate the Court's April 1, 2013, Order deeming the Plaintiff's Request for Admission admitted & Motions to File Late Answers to Requests for Admission, and the Court having conducted a hearing on September 25,

2013, with the proceedings recorded on CD No. 35-2-2013-VR-49-A-1, IT IS HEREBY ORDERED AS FOLLOWS:

1. Purdue Pharma's Motions are DENIED.

2. Abbott Laboratories' Motions are GRANTED. The Court's April 1, 2013, Order is VACATED as to it, and Abbott Laboratories shall have twenty (20) days to submit its Answers to Requests for Admission.

(App. C, Sept. 25, 2013 Order.)

The Commonwealth publicly has taken the position that, following this order, the deemed admissions establish Purdue's liability, leaving for trial only the question of damages.[6] Indeed, since the Court of Appeals's decision, on April 2, 2014, the Commonwealth has moved for summary judgment on the issue of Purdue's liability based on the deemed admissions and for a trial on damages only.

H. The Court of Appeals "Would Be Inclined" to Grant a Writ, But Believes Itself Constrained to Deny Relief Out of Deference to This Court

Following the September 25, 2013 order, Purdue filed an original proceeding in the Court of Appeals for a writ pursuant to CR 76.36. Purdue requested that the Court of Appeals prohibit the Circuit Court from enforcing its order deeming the requests admitted and direct the Circuit Court either to rescind its deeming order and accept Purdue's tendered responses or to allow Purdue to withdraw or amend any deemed admissions and substitute its tendered responses. The Court of Appeals, on its own, took the unusual step of requesting oral argument on Purdue's writ petition. At that argument, it made clear its

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[6] (*See, e.g.*, Ex. 25, Office of the Att'y Gen., *Attorney General Conway Announces Key Rulings in Purdue Pharma Case* (Sept. 30, 2013); Ex. 26, Nick Storm, *Oxycontin maker missed key court deadline; Conway says it's akin to admitting liability*, cn|2 Pure Politics (Aug. 23, 2013); Ex. 27, Nick Storm, *Pike Circuit Court ruling against Oxycontin maker could bring 'nine figure' settlement*, cn|2 Pure Politics (Sept. 30, 2013).)

concerns about the proceedings in the Circuit Court and the likelihood there was "reversible error." (App. F, 2/11/14 Oral Arg. Tr. at 23, VR 09:23:53-09:24:29.)

In its opinion, the Court of Appeals noted that "Purdue makes compelling arguments in favor of a writ," including that the Circuit Court's ruling not only may be "incorrect," but also "may be decisive as to liability." (2/28/14 Op. at 9, 12.) Moreover, the Court stated that its "judicial conscience" could not ignore the "legitimate question[s] . . . presented ***whether*** the deadline passed for responding to these admissions after remand from the federal court," and, if so, ***whether*** there was "any prejudice caused to the Commonwealth." (*Id.* at 9-10 (emphasis added).) It further noted that, "[u]nder the circumstances, it would seem judicially economical and expedient to grant the writ and resolve this issue." (*Id.* at 10.) It then discussed several cases from other states that had followed just such an approach when confronted with writ petitions, like Purdue's, challenging orders that effectively denied a party an opportunity to present its case on the merits. (*Id.* at 10-12.) Indeed, if it "were writing on a clean slate," the Court of Appeals declared, it "would be inclined to follow the reasoning expressed by our sister state courts" and grant relief. (*Id.* at 12.)

Yet, "as compelling as Purdue's arguments may be," the Court of Appeals concluded, "we do not believe this Court has authority to carve out an exception to the writ requirements as firmly established by our Supreme Court." (*Id.* at 12-13.) Despite its concerns about whether appeal actually could be an adequate remedy here, the Court of Appeals did not believe this case fell within its interpretation of existing Kentucky writ precedent. (*See id.*) With respect, the Court of Appeals properly assessed the egregiousness of the facts, but failed to recognize that existing Kentucky law permits a

writ in this extraordinary circumstance. Whether it applies existing law to this new situation or extends the law, this Court should accept the Court of Appeals's invitation to exercise its unique authority to grant relief.

ARGUMENT

I. The Standard for Review of an Extraordinary Writ Petition

An extraordinary writ is proper when "the lower court is acting . . . erroneously . . . and there exists no adequate remedy by appeal or otherwise and great injustice and irreparable injury will result if the petition is not granted." *Hoskins v. Maricle*, 150 S.W.3d 1, 10 (Ky. 2004); *PremierTox 2.0 v. Miniard*, 407 S.W.3d 542, 546 (Ky. 2013) (citation omitted). But the requirement of "great and irreparable harm" to the petitioner "may be put aside in '***certain special cases*** . . . [where] a substantial miscarriage of justice will result if the lower court is proceeding erroneously, ***and*** correction of the error is necessary and appropriate in the interest of orderly judicial administration.'" *Grange Mut. Ins. Co. v. Trude*, 151 S.W.3d 803, 808 (Ky. 2004) (quoting *Bender v. Eaton*, 343 S.W.2d 799, 801 (Ky. 1961)) (emphasis and alterations in original). "[I]n such a situation the court is recognizing that if it fails to act the administration of justice generally will suffer the great and irreparable injury." *Bender*, 343 S.W.2d at 801.

"Generally, the standard for appellate review of the propriety of a writ is 'limited to an abuse-of-discretion inquiry, except for issues of law which are reviewed *de novo*.'" *PremierTox 2.0*, 407 S.W.3d at 545 (quoting *Rehm v. Clayton*, 132 S.W.3d 864, 866 (Ky. 2004)). Here, the Court of Appeals did not purport to exercise its discretion in denying a writ. Instead, it declared that Purdue made "compelling arguments in favor of a writ," yet concluded that it did not have legal discretion to grant relief. (App. A, 2/28/14 Op. 9-13.) Thus, "the only determination made by the Court of Appeals was regarding the

availability of an adequate remedy outside of a writ, a question of law," and so this Court "review[s] the entire proceeding *de novo*." *Southern Fin. Life Ins. Co. v. Combs*, 413 S.W.3d 921, 926 (Ky. 2013). *De novo* review also applies because "the alleged error invoked the 'certain special cases' exception." *Trude*, 151 S.W.3d at 810.

II. Summary of the Argument

The Court of Appeals was correct that this is a "compelling" case for a writ, but it was mistaken in concluding that it lacked the power to grant one. As shown below, existing Kentucky law provides at least two routes to a writ in this extraordinary case.

First, Kentucky jurisprudence allows writs in exceptional cases of injustice where correction of the error is necessary to protect against harm to orderly judicial administration. ***In fact, this Court has the singular constitutional authority – and duty – to issue writs when required to prevent injustice.*** Ky. Const. § 110(2)(a). This is particularly true where, as here, the case presents issues of applying the Civil Rules on which there is no reported Kentucky precedent, a situation this Court previously has considered sufficient on its own to justify review of the merits of a writ petition.

Second, this Court has recognized that writ review is appropriate where, as here, the challenged interlocutory orders transform the proceedings so fundamentally and impose such unfair settlement pressure and other prejudice on the aggrieved party that post-judgment appeal will be not only inadequate, but potentially foreclosed altogether.

Additionally, the Court of Appeals suggested a third route to granting a writ, based on precedents from other states, that it believed only this Court could provide. This narrow approach allows a writ in certain situations where clearly erroneous orders effectively could end the case or otherwise drastically skew the proceedings by severely compromising or denying a party's ability to present the merits of its case. This Court

has not had the opportunity to consider this basis for a writ, yet its logic is consistent with principles this Court has expressed in prior Kentucky writ cases. Accordingly, in the event the Court finds a writ unavailable under its prior precedent, this Court should resolve the open question by endorsing the Court of Appeals's suggested approach.

Moreover, this case presents a unique confluence of factors, not likely to arise again, that make a writ particularly appropriate. The Circuit Court's orders are clearly erroneous. They raise important unanswered questions of law under CR 36. They threaten effectively to end the case on liability before it really even has begun. And they impose intense and unfair pressure to accept a settlement and forego appeal. Given this "perfect storm" of special circumstances, a writ here would allow the Court to redress the exceptional injustice without opening the doors to a flood of future writ petitions.

III. Kentucky Law Allows Writs In Exceptional Cases of Injustice, Including Where, As Here, The Errors Involve Issues Under the Civil Rules On Which There is No Reported Kentucky Precedent

Kentucky law has long allowed writs in exceptional cases of injustice where correction of the error is necessary to protect against harm to orderly judicial administration. *See, e.g.*, *Bender v. Eaton*, 343 S.W.2d 799, 800-01 (Ky. 1961). In fact, the Kentucky Constitution vests this Court, unlike the Court of Appeals, with the authority – and duty – "to issue all writs . . . as may be required to exercise control of the Court of Justice" in order to prevent injustice. Ky. Const. § 110(2)(a); *cf. id.* § 111(2). This constitutional supervisory authority is "very broad" and "has no limits except [this Court's] judicial discretion, and each case must stand on its own merits." *Bender*, 343 S.W.2d at 800.

In applying this broad mandate to do justice, this Court has declared that "perhaps . . . the most compelling consideration" favoring review of the merits of a writ petition is

where "the proper construction and application of the Rule in question . . . is important to the orderly administration of our Civil Rules." *Id.* at 802. Thus, as an example of its application of the *Bender* principles of using writs to address exceptional situations, this Court has concluded that "[t]he ***absence of any reported Kentucky precedent*** construing an important component of" a Civil Rule "***in and of itself*** would justify a review of the merits" of an original proceeding for a writ. *CSX Transp., Inc. v. Ryan*, 192 S.W.3d 345, 348 (Ky. 2006); *see Sexton v. Bates*, 41 S.W.3d 452, 455 (Ky. App. 2001) (followed in *Ryan* and reviewing merits of writ petition because "[t]he absence of any Kentucky reported authority construing and applying an important component of" the Civil Rule at issue "***by itself*** would justify a review of the merits of the case" (emphasis added)).[7]

In *Ryan*, this Court held that the question of first impression merited consideration on writ review because a definitive ruling on the application of the rule in question was "important to the orderly administration of our Civil Rules" and "would be of value to the Bench and Bar of Kentucky." *Ryan*, 192 S.W.3d at 348 (quoting *Bender*, 343 S.W.2d at 802). That decision to accept a writ petition solely because it presented an important procedural question of first impression was in lock-step with the *Bender* Court's instruction: "if an erroneous order results in a substantial miscarriage of justice and the orderly administration of our Civil Rules necessitates an expression of our views, we may, and in the proper case should, decide the issue presented" in a writ petition. *Bender*, 343 S.W.2d at 802. This Court should do the same in this case.

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[7] Although this Court reversed on the merits in *Ryan*, it agreed with the Court of Appeals, in *Ryan* and in *Sexton*, that merits review of the writ petitions was appropriate due to the absence of reported Kentucky authority construing the Civil Rules at issue.

No reported authority exists yet to guide Kentucky's lower courts on either of the CR 36 issues presented here. First, no Kentucky rule or authority, published or unpublished, governs whether or when a response is required to pre-removal requests for admissions following remand from federal court. This "***in and of itself*** would justify a review of the merits of the case." *Ryan*, 192 S.W.3d at 348 (emphasis added); *Sexton*, 41 S.W.3d at 455; *see also Bender*, 343 S.W.2d at 802 (accepting writ petition for merits review where "[w]e have not heretofore had occasion to pass upon [the] meaning or effect" of a rule). Where, as here, the consequences of a missed deadline potentially include a summary establishment of liability without any ability to present key defenses, the complete absence of guidance threatens the rule of law. It is not just unfair; it is dangerous.

Second, although the Court of Appeals has made clear in three unpublished opinions how trial courts should apply CR 36.02 to withdrawal or amendment of deemed admissions, no ***reported*** Kentucky authority interprets and applies this component of the rule.[8] This case shows the danger that can exist in the absence of reported authority. As this Court did in *Ryan*, and as the Court of Appeals did in *Sexton*, this Court should review the merits of the Circuit Court's decision denying withdrawal or amendment and render a published opinion so that parties and courts no longer may dismiss or ignore the

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[8] The Commonwealth suggested that *Manus, Inc. v. Terry Maxedon Hauling, Inc.*, 191 S.W.3d 4 (Ky. App. 2006), was published authority pertinent to withdrawal or amendment under CR 36.02 and should be followed instead of the three unpublished decisions that are more directly on point. (*See* Ex. 6, Sept. 25, 2013 Hrg. Tr. at 29-30.) However, *Manus* included no discussion of the standard for withdrawal or amendment under CR 36.02, and, in fact, the Court there specifically noted "that Manus did not attempt to withdraw the admissions pursuant to CR 36.02." *Manus*, 191 S.W.3d at 9. Thus, *Manus* is not reported authority addressing the CR 36.02 standard for withdrawal or amendment of deemed admissions.

direction the Court of Appeals already has given. *See Sisters of Charity Health Sys., Inc. v. Raikes*, 984 S.W.2d 464, 467 (Ky. 1998) (review of a writ petition appropriate where, "[d]espite five Published cases, which span a quarter of a century," deciding the legal question at issue in the same way, "the issue continues to be litigated again and again").

Further, applying the *Bender* principles, this Court has reviewed the merits of writ petitions where "the issue raised . . . is sufficiently important." *Mammoth Med., Inc. v. Bunnell*, 265 S.W.3d 205, 212 (Ky. 2008). In addition to the need to make clear law concerning CR 36 to facilitate orderly judicial administration, the issue of whether Purdue is legally responsible for prescription drug abuse and diversion in Kentucky is an important one, and this case should be a search for the truth. This question should not be decided on a false record or with one party unable to present the merits of its side. The Circuit Court's orders will make it impossible for the proceedings in this case to serve any genuine truth-seeking function. Any verdict tainted by objectively false and hotly disputed "admissions" would be illegitimate from the moment it issues and would disserve the public's interest in determining the causes of and responsibility for important public health issues in this commonwealth.

IV. This Court Has Recognized That, Under Certain Special Circumstances, Unfair Settlement Pressure and Other Threatened Prejudice Can Render Appeal Inadequate and Warrant Writ Review

The mere "right to appeal does not necessarily indicate an adequate remedy." *PremierTox 2.0 v. Miniard*, 407 S.W.3d 542, 548 (Ky. 2013) (citation omitted).

A. Unfair Settlement Pressure Can Render Appeal Inadequate

This Court has held a potential appeal to be inadequate, and a writ appropriate, where a Circuit Court's order unfairly pressures a party to settle because the alternative is "a route most reasonable parties would avoid." *Kentucky Farm Bureau Mut. Ins. Co. v.*

Wright, 136 S.W.3d 455, 459 (Ky. 2004). In that situation, present here, the hypothetically available right to appeal after judgment offers an inadequate remedy.

In *Kentucky Farm Bureau*, the Court granted a writ of prohibition where a mediation order provided that "[i]f the case is settled after the conclusion of mediation then additional costs, fines and penalties will be imposed." *Id.* at 457. As a practical matter, the order forced the parties to settle at mediation, regardless of the merits of the claims, because, "[u]nder the trial court's order, parties who settled after the conclusion of mediation, despite a belief in their right to do so, would be required to face mandatory fines and penalties, a route most reasonable parties would avoid." *Id.* at 459. In other words, the specter of the order's mandatory sanctions for settling after mediation made the failure to settle at mediation an unacceptable risk. That factor dictated that settlement – which would render the order un-appealable – would be the outcome most reasonable parties would be constrained to pursue. Under those circumstances, although the petitioner "may have a remedy by appeal" in theory, that remedy was inadequate "due to the risk a party would have to encounter to ripen the issue for appellate review." *Id.*

Consistent with *Kentucky Farm Bureau*, this Court has "acknowledged that certain special circumstances can exist where" other kinds of procedural orders "can be challenged through mandamus" due to the unfair settlement pressure they create. *Merck & Co. v. Combs*, No. 2010–SC–000529–MR, 2011 WL 1104133, at *3 (Ky. Mar. 24, 2011) (discussing *Garrard County Bd. of Educ. v. Jackson*, 12 S.W.3d 686 (Ky. 2000)).

In *Merck* and *Jackson*, this Court illustrated this concept by pointing to several other cases, including *In the Matter of Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995), a case in which writ review was granted because the settlement pressure arising

from the challenged order effectively ended the case and rendered illusory any theoretical "right" to appeal after final judgment.[9] *Merck*, 2011 WL 1104133, at *3; *Jackson*, 12 S.W.3d at 689-90 & n.1. The rationale for writ review is that certain pre-trial rulings, such as an order certifying a class, can so transform the litigation and create such unacceptable risk of liability for a massive judgment that no reasonable defendant would incur that risk, ***even if the judgment is likely to be overturned on appeal.*** *Rhone-Poulenc*, 51 F.3d at 1297. In such cases, defendants unfairly face "***intense pressure to settle.***" *Id.* at 1298 (collecting scholarly authority; emphasis added).

In those situations, regardless of the clarity of the error and the likelihood that the order will be reversed on post-judgment appeal, even a slight chance that a crushing verdict could issue and be upheld means that the most rational option typically will be to succumb to a settlement, almost always in an amount greater than the plaintiffs would be able to demand without the leverage of the challenged order and the attendant risk it threatens. Of course, if the defendant accepts an inflated settlement, the interlocutory ruling "that will have forced them to settle – will never be reviewed." *Id.* Under these circumstances, "the first condition for the grant of mandamus – that the challenged ruling not be effectively reviewable at the end of the case – is fulfilled." *Id.* at 1299.

This Court observed that the "economies of scale at play" in cases like *Rhone-Poulenc* can be a special circumstance sufficient to warrant relief by extraordinary writ where orders are imposing intense settlement pressure. *Jackson*, 12 S.W.3d at 690.

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[9] For another example of a court granting a writ where the challenged order causes undue settlement pressure, *see CSR Ltd. v. Link*, 925 S.W.2d 591, 596 (Tex. 1996) (granting writ to require dismissal for lack of personal jurisdiction where order asserting jurisdiction in mass tort case "creates considerable pressure to settle the case, regardless of the underlying merits").

According to the Court, the challenged order in *Rhone-Poulenc* "effectively required a corporation which had won twelve of thirteen previous trials on this liability issue to choose between 'rolling the dice' at a trial" and risking a massive verdict "or settling the case." *Id.* at 690. Purdue faces the same unfair dilemma here.

The Circuit Court's orders here are just as coercive, potentially litigation-ending, and deserving of an extraordinary writ as the orders in *Kentucky Farm Bureau* and the federal cases discussed in *Jackson* and *Merck*. As shown below, they (1) confront Purdue with the risk of a potentially ruinous judgment, and (2) impose the kind of extraordinarily intense settlement pressure on Purdue this Court has acknowledged supports relief by writ. Thus, while writs were not granted in *Jackson* or *Merck*, ***this*** is the exceptional case of "special circumstances" this Court contemplated where an erroneous order imposes such intense settlement pressure that it threatens to end the litigation, erasing the adequacy of appeal.

1. The Circuit Court's Orders Confront Purdue With the Risk of An Immense and Ruinous Judgment

This case involves breathtaking "economies of scale." The Commonwealth is seeking broad damages and sweeping injunctive relief "on behalf of the Commonwealth of Kentucky and its citizens." (Ex. 4, First Am. Compl. ¶ 6 (emphasis added).) Particularly if Purdue is prevented from defending itself effectively, the following damages sought by the Commonwealth could produce a record-breaking verdict:

- prescription costs paid by the Commonwealth for OxyContin;
- medical costs associated with the diagnosis and treatment of adverse health consequences of OxyContin use, including but not limited to, addiction;
- prescription costs related to OxyContin incurred by Kentucky consumers;

- costs incurred and likely to be incurred in an effort to combat OxyContin abuse and diversion, including law enforcement and other expenditures;
- a massive medical monitoring fund to pay for, among other things, diagnosis, treatment, and ongoing testing and monitoring of OxyContin-related injuries, and also research concerning OxyContin's effects and possible treatments for them;
- disgorgement;
- pre- and post-judgment interest, as well as attorneys' fees and other costs; and
- punitive damages.

(*Id.* ¶ 5 & Prayer for Relief ¶¶ H-J, M-P.)

Yet the sweeping scope of these claims only partially captures Purdue's unique situation. Rarely are erroneous rulings by the trial court said by the adverse party to have stripped away the defendant's ability to contest liability. Here, the Circuit Court's orders create the risk that a fair defense will be essentially impossible for Purdue. The Commonwealth already has taken the position that the deemed admissions establish Purdue's liability and that all that remains is a limited trial on damages, both publicly (Ex. 26), and in recent motions for summary judgment on liability and a damages-only trial. The Commonwealth thinks it effectively already has achieved a default judgment, only by another name. And it further has contended that, based on Purdue's supposed "admissions," the Commonwealth is entitled to "hundreds of millions of dollars" in compensatory damages. (Ex. 27.) Add the requested pre- and post-judgment interest and punitive damages, and the total amount at stake in this case surpasses a ***billion dollars***.[10]

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[10] There was no "objective evidence of prejudice" proffered in *Jackson* or *Merck*, *Jackson*, 12 S.W.3d at 690 (quoted in *Merck*, 2011 WL 1104133, at *3), but Purdue has submitted the affidavit of its Chief Financial Officer Edward B. Mahony, which establishes that a verdict of that size would be financially "ruinous" to Purdue. (*See* Ex. 30, Mahony Aff. ¶¶ 6-8); *see Robertson v. Burdette*, 397 S.W.3d 886, 891 (Ky. 2013) (quoting *Bender*, 343 S.W.2d at 801). Among other things, it would trigger lay-offs of

In short, the Circuit Court's orders confront Purdue with the type of intolerable risk that this Court has acknowledged can nullify the adequacy of appeal as a remedy. *See Jackson*, 12 S.W.3d at 689-90 & n.1; *Merck*, 2011 WL 1104133, at *3; *see also, e.g.*, *Rhone-Poulenc*, 51 F.3d at 1297-99.

2. Under the "Special Circumstances" Here, The Settlement Pressure the Circuit Court's Orders Place On Purdue is Extraordinarily Intense

Purdue thus faces two unfair and irreparable paths. It can proceed to trial saddled with supposedly dispositive deemed admissions, incur what the Commonwealth predicts to be a record-setting verdict, and endure the crippling damage that would go with it, all just to get the chance to appeal. Or it can yield to the Circuit Court and Commonwealth's pressure to settle, but only after the erroneous rulings irrevocably have elevated the settlement negotiations to an unjustifiable level, unrestrained by the true facts or Purdue's actual legal liability. In that instance, there will be no appeal. The first path's risks are intolerable; the second would require swallowing an unappealable, grossly inflated settlement. Both options are routes "most reasonable parties would avoid." *Kentucky Farm Bureau*, 136 S.W.3d at 459. And neither offers an adequate remedy by appeal.

In many ways, in fact, the Circuit Court's orders in this case have created risks to Purdue that dwarf those at issue in *Kentucky Farm Bureau*, *Jackson*, *Merck*, and *Rhone-Poulenc*.[11] The defendants in those cases did not risk being stripped of important aspects

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hundreds of employees, severely restrict the research and development function, and force the company to sell off important capital assets. (Mahony Aff. ¶ 7.)

[11] In *Merck*, for example, the defendant was one of the 10 largest pharmaceutical manufacturers in the world, which recently has posted annual sales of more than ***$47 billion***. (Ex. 30, Mahony Aff. ¶ 5.) Thus, although the $60 million estimated exposure facing Merck in that case might well be "crippling" to a much smaller company, there was no "specific evidence" presented to the Court that liability in that range would have

of their defenses or deemed to have conceded critical issues, such as causation, which they had won in dozens of prior cases.[12] Nor were they forced to stand mute while the jury was asked to decide liability on the basis of "facts" everyone in the courtroom except the jury knew to be false or at least sharply contested. *See infra* Part VI.B.2.a. Nor did they face an adversary who has attempted to use an interlocutory order to drive a wedge between the defendant and its long-time counsel by sending its counsel letters accusing them of malpractice and advising that they "place [their] legal malpractice insurer[s] on notice of a potential claim." (*See, e.g.*, Ex. 22, April 15, 2013 Riley Letter to Sagan and Famularo.) Nor did they face an opponent so emboldened in its settlement demands by the challenged order that settlement itself, paradoxically, may be out of reach.[13] Yet that is precisely the situation facing Purdue.

In contrast, writ relief would return the parties to the path that should be before them but for the Circuit Court's unjust and erroneous rulings. It might even sufficiently level the playing field that it will be possible for the parties to resolve the case in a rational manner reflecting the merits of the parties' claims and defenses, rather than the

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that effect on a giant like Merck. *Merck*, 2011 WL 1104133, at *3. The amount at risk here is more than ***ten times*** the amount at issue in *Merck*, and Purdue has presented "specific evidence" of the crippling effect such a judgment would have on Purdue, a much smaller company. (Mahony Aff. ¶¶ 5-14.)

[12] The *Jackson* Court found it significant that, in *Rhone-Poulenc*, the challenged order imposed intense pressure on the defendant to settle even though it had "won twelve of thirteen previous trials on this liability issue." *Jackson*, 12 S.W.3d at 690. Here, the Circuit Court's order deeming Purdue to have admitted that it "caused" certain alleged damage (App. D, Plfs.' Requests for Admissions Nos. 17-19) puts Purdue in the same position, even though, in fact, Purdue sharply disputes the critical issue of causation and no plaintiff has been able to establish causation in more than 13 years of litigation over the same conduct and liability issues alleged in this case. *See, e.g.*, *United States v. Purdue Frederick Co.*, 495 F. Supp. 2d 569, 575 (W.D. Va. 2007) (collecting cases).

[13] The Attorney General publicly has announced, after the Circuit Court orders, that his settlement expectations now reach "well into nine figures." (Ex. 27.)

perceived "leverage" conferred on the Commonwealth by the Circuit Court's orders flowing from the undeniable risk to Purdue of having to defend the case with both hands tied behind its back.

B. Appeal Will Not Cure the Prejudice Threatened By Trial or Permit a Fair Re-Trial

Forcing Purdue to try this case crippled by the erroneous orders also would render inadequate any appeal because of the irreversible damage Purdue would have to endure merely to obtain the right to appeal. *Kentucky Farm Bureau*, 136 S.W.3d at 459.

Initially, a record-setting verdict based on the erroneously deemed admissions in this highly-publicized and closely-watched case would provide a benchmark with which all future jurors would be familiar. Once exposed to the headline-grabbing judgment the Commonwealth expects in this uniquely media-sensitive case, it would be impossible for the jury pool to forget what they think they know about the fact and amount of Purdue's liability, even if overturned on appeal. That would be especially true when the press inevitably characterizes the first verdict as having been reversed on a "legal technicality." Thus, even if successful on post-judgment appeal, Purdue would face re-trial in a setting irrevocably poisoned by the Circuit Court's erroneous admissions rulings.

Compounding matters, the Attorney General and media already are speaking publicly and often about the deemed admissions as established "facts." Particularly prominent is the notion that Purdue actually has admitted that it has caused great and ongoing damage to the Commonwealth and its citizenry. (*See, e.g.*, Ex. 25; Ex. 26.) Any judgment based on these false and unproven "admissions" further would cement in the minds of potential re-trial jurors the erroneous conclusion – ostensibly bolstered by the credence of judicial imprimatur – that Purdue, in fact, is responsible for the substantial

damage alleged in this case. ***Yet, even in its criminal plea, Purdue never has admitted, nor has anyone ever proven, that it actually caused legally recoverable damage to anyone, including the Commonwealth of Kentucky.***[14] (*See* Pet. at 21-22, 28-29.)

To the contrary, as the federal judge who presided over the criminal plea himself recognized, Purdue has defeated case after case filed against it over the past dozen years because the plaintiffs could not prove that the challenged misstatements caused them harm. *United States v. Purdue Frederick Co.*, 495 F. Supp. 2d 569, 575 (W.D. Va. 2007) (collecting cases). Indeed, in rejecting third-party insurance restitution claims similar to the Medicaid claims here, the federal court specifically held that anyone claiming injury as a result of the misstatements to which Purdue admitted, despite the existence of the plea, still would have to prove individual causation, a heavy and complicated burden no prior litigant ever has met.[15] *Id.* at 573-75. In fact, after Purdue's plea, the judge who accepted the plea has continued to dismiss OxyContin personal injury claims for lack of causation. *See Boysaw v. Purdue Pharma*, No. 1:07CV00079, 2008 WL 2076667, at *2 (W.D. Va. May 16, 2008) ("Despite the plaintiff's contention that the defendants' guilty pleas for the misbranding of OxyContin amount to an admission of liability in the instant

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[14] In 2007, Purdue entered into a criminal plea and settlement with the federal government. In connection with the plea, Purdue made certain limited admissions relating to the conduct of certain, but not all, employees alleged to have taken place between 1995 and June 2001. (*See* Agreed Statement of Facts, attached as Exhibit A to First Am. Compl. (Ex. 4).)

[15] This is consistent with the long and unbroken string of OxyContin claims against Purdue that have failed for lack of causation, including in Kentucky. *See, e.g.*, *Foister v. Purdue Pharma L.P.*, 295 F. Supp. 2d 693, 703-04 (E.D. Ky. 2003) (granting summary judgment for lack of causation); *Foister v. Purdue Pharma L.P.*, No. 01-268-JBC, 2001 U.S. Dist. LEXIS 23765, at *27 (E.D. Ky. Dec. 27, 2001) (Kentucky plaintiffs "have failed to produce any evidence showing that the defendants' marketing, promotional, or distribution practices have ever caused even one tablet of OxyContin to be inappropriately prescribed or diverted.").

action," court "cannot infer without additional proof that OxyContin was the proximate cause of the plaintiff's injuries."). The idea that Purdue ever has admitted or been proven to have caused any specific harm is simply false. But appeal would be inadequate to erase the misperception, inevitably created by a highly-publicized verdict, that Purdue not only caused harm but admitted that it had done so.

C. *Chauvin* Does Not Bar a Writ in This Case

In denying a writ, the Court of Appeals incorrectly suggested that Purdue's argument was based on "concerns regarding the expense of litigation" that were deemed insufficient to support a writ in *Independent Order of Foresters v. Chauvin*, 175 S.W.3d 610 (Ky. 2005). (App. A, 2/28/14 Op. at 7-8, 12.) Any such basis for denying a writ misreads Purdue's arguments. Purdue faces a situation far different from the one faced by the defendant in *Chauvin*, who had a full opportunity to defend itself at trial and, thus, was deemed only to be complaining about the unnecessary costs of the litigation if a writ were not granted. *See Chauvin*, 174 S.W.3d at 615 (rejecting argument that the large costs of litigating a nationwide class action, by themselves, rendered appeal inadequate). In sharp contrast, Purdue is ***not*** arguing that appeal is inadequate because of litigation costs or delays. Instead, appeal is inadequate because Purdue has no viable or fair way to escape the dilemma in which the Circuit Court's orders have placed it – literally every option other than writ relief is a route "most reasonable parties would avoid." *Kentucky Farm Bureau*, 136 S.W.3d at 459. The concern in *Chauvin* that granting a writ would open the floodgates to more writs, brought by disappointed litigants worried only about ordinary litigation costs or delays, is not present in this unusual and extraordinary case.

V. This Court Should Follow the Court of Appeals's Suggestion to Allow a Writ Because the Challenged Orders Effectively Could End the Case By Denying Purdue's Ability to Present the Merits of Its Defense

Another basis for granting a writ here is for this Court to exercise its constitutional duty to ensure fairness in the Court of Justice by accepting the Court of Appeals's invitation to do what the Court of Appeals believed it could not: join the other states that agree that a writ may issue in the few exceptional cases where clearly erroneous trial court orders effectively preclude a party from presenting the merits of its case and so distort the proceeding as to render an eventual appeal inadequate. *See* 55 C.J.S. *Mandamus* § 103 ("Mandamus will issue where a party's ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court's discovery error."); 52 Am. Jur. 2d *Mandamus* § 324 (same).

Although this Court has yet to consider whether and under what circumstances to allow this category of writs, the rationale underlying it is ***consistent with cases***, like *Jackson*, *Merck*, and *Kentucky Farm Bureau*, ***in which this Court has recognized*** that writs may be appropriate where interlocutory orders unfairly distort the proceedings or could have the effect of ***essentially ending the litigation*** without full consideration of the merits. Thus, it would require minimal, if any, extension of the principles of Kentucky law to permit a writ in this extraordinary case involving erroneously deemed admissions.

A number of courts have granted writs under circumstances directly on point here – where the challenged orders found facts to have been admitted that "essentially determine[d] liability against [the petitioners] and strip[ped] them of their ability to mount a meaningful defense." *In re Spooner*, 333 S.W.3d 759, 766 (Tex. App.-Houston

[1st Dist.] 2010); *see also, e.g.*, *St. Mary v. Superior Court*, 167 Cal. Rptr. 3d 517 (Cal. Ct. App. 2014).[16]

The *Spooner* court recognized that an appeal from a trial where one party, based on supposed admissions, was not allowed to contest liability would not resemble an appeal from an otherwise fair trial. In other words, "[d]enying [the petitioners] the right to offer evidence to controvert [the putative admissions] would not only skew the proceedings and potentially affect the outcome of the litigation, but also compromise the presentation of [the petitioners'] defense in ways that are unlikely to be apparent in the appellate record." *Spooner*, 333 S.W.3d at 766. Importantly, the justification did not lie solely in "the additional expense and effort of preparing for and participating in trial." *Id.* Rather, the court was concerned about "the potential waste of private and public resources . . . ***combined*** with the skewing of the proceedings, the hampering of [the petitioners'] ability to present their defenses, and the possibility that [the petitioners] may not be able to successfully prosecute an appeal." *Id.* at 767 (emphasis added).

The Texas court reached this conclusion in the context of general writ law that has many key similarities to Kentucky's. In particular, Texas courts, like Kentucky's, have emphasized time and again that "[t]he requirement that persons seeking mandamus relief

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[16] *See also, e.g.*, *Ex parte U.S. Bank Nat'l Ass'n*, -- So. 3d --, 2014 WL 502370, at *3 (Ala. Feb. 7, 2014) (writ review is appropriate "when the court imposes a sanction effectively precluding a decision on the merits . . . so that the outcome is all but determined and the petitioner would merely be going through the motions of a trial to obtain an appeal"); *Ex parte Buffalo Rock Co.*, 941 So. 2d 273, 277 (Ala. 2006) ("A trial court's disallowance of a party's affirmative defense is reviewable by a petition for a writ of mandamus."); *Thermorama, Inc. v. Shiller*, 135 N.W.2d 43, 46 (Minn. 1965) (a writ should issue where "the action of the court relates to a matter that is decisive of the case") (cited in 2/28/14 Op. at 10).

establish the lack of an adequate appellate remedy is a 'fundamental tenet' of mandamus practice." *Walker v. Packer*, 827 S.W.2d 833, 841 (Tex. 1992); *accord Independent Order of Foresters v. Chauvin*, 175 S.W.3d 610, 614 (Ky. 2005). Moreover, as in Kentucky, "an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ." *Walker*, 827 S.W.2d at 842. Rather, a writ will issue "only when parties stand to lose their ***substantial rights***." *Iley v. Hughes*, 311 S.W.2d 648, 652 (Tex. 1958) (emphasis added).

Protection of parties' substantial rights is the very reason Texas courts have found discovery orders that erroneously could disable a party from presenting an otherwise viable claim or defense, like the orders at issue here, to be within the scope of the writ power. *See Walker*, 827 S.W.2d at 840-44. In *Walker*, for example, the Texas Supreme Court concluded that "appeal will not be an adequate remedy," where "the party's ability to present a viable claim or defense at trial is vitiated or severely compromised by the trial court's discovery error," with "the effect of ***precluding a decision on the merits of a party's claims***." *Id.* at 843 (quoted in App. A, 2/28/14 Op. at 11; emphasis in original).

Later decisions affirm that an order erroneously deeming facts admitted is precisely within this narrow category of writ-worthy interlocutory orders. *See Spooner*, 333 S.W.3d at 766; *In re Am. Gunite Mgmt. Co.*, No. 02-11-00349-CV, 2011 WL 4550159, at *2 (Tex. App.-Fort Worth Oct. 3, 2011) (quoted in 2/28/14 Op. at 11-12) (granting writ where "the trial court abused its discretion by denying American Gunite's motion to set aside the deemed admissions because the deemed admissions were merits-preclusive"); *In re Rozelle*, 229 S.W.3d 757, 759, 761 (Tex. App.-San Antonio 2007) (granting writ to overturn order deeming admitted requests that were "phrased almost

exclusively as issue-preclusive legal conclusions" because "[a]n appeal is not an adequate remedy . . . when a party's ability to present a viable claim or defense at trial is destroyed or severely compromised by a trial court's discovery error").

California courts, too, have granted writs in this exact situation against a backdrop of general writ law that also has many similarities to Kentucky's. Despite emphasizing that "additional time and effort" to pursue an ordinary appeal does not justify writ relief by itself, courts there have granted writs where "the trial court's order deprived petitioner of an opportunity to present a substantial portion of his cause of action." *Omaha Indem. Co. v. Super. Court*, 258 Cal. Rptr. 66, 67, 70 (Cal. Ct. App. 1989); *see also Roden v. AmerisourceBergen Corp.*, 29 Cal. Rptr. 3d 810, 815-16 (Cal. Ct. App. 2005). In *St. Mary*, the court applied this standard to issue a writ against an order deeming requests admitted where the proposed responses were served only days later and were in "substantial[] complian[ce]" with the rules. 167 Cal. Rptr. 3d at 535. A writ was proper because the trial court order had "the potential of curtailing or preventing St. Mary from proving her case, irrespective of the actual merits of her claims." *Id.*

Purdue has met the writ standard applied in these cases. As the Court of Appeals put it, "[t]he damaging effect of the admissions is undeniable: Although at trial, Purdue may 'explain, clarify, or elucidate' the admissions, there is no question the admissions pose a formidable obstacle to victory." (2/28/14 Op. at 9 (citation omitted).) Indeed, if the Commonwealth has its way, Purdue will have no ability to present ***any defense to liability at all.*** That not only will prevent presentation of the case on the merits, but also irretrievably will distort and artificially limit the record on appeal. Such an appeal simply is not an adequate remedy.

And as the Court of Appeals pointed out during oral argument, it also is true that postponing review of the orders until the end of the case needlessly will waste resources because it already is readily apparent that the Circuit Court committed reversible error:

> JUDGE THOMPSON: Okay. General Conway, before you get started, go on and – come on up to the podium, but I think – ***I think with confidence I can say the majority of this panel believes you might have a reversible error if you win this writ***, and then you'll go back and have a trial and years later you'll come up here and ***if you get our – our panel, or someone that's similarly thought – thinks like us, you'll get reversed or you go to the Supreme Court and get reversed, then you go back and have another trial. Do you really want that if you're going to get this huge judgment?*** Think about that. . . .

(App. F, 2/11/14 Oral Arg. Tr. at 23, VR 09:23:53-09:24:29 (emphasis added).)

When confronted with these concerns, the Commonwealth's response was only to suggest that the Circuit Court had virtually unfettered discretion, which is not the case, and otherwise to hide behind an extreme reading of Kentucky law. (*See id.* at 24-25, VR 09:24:46-09:25:36; *see also id.* at 28, VR 09:28:39-09:29:13; *id.* at 29-31, VR 09:29:47-09:30:35.) The Commonwealth's position essentially is that writ relief is never available no matter how egregious the error, how much it distorts the underlying proceedings, how much of a threat it poses to orderly judicial administration, and how certain it is to be reversed, as long as the aggrieved party theoretically might be able to obtain relief on appeal. That cannot be what this Court's writ precedent means. There is no way to square such an emasculated reading of this Court's writ authority with the power and responsibility the Kentucky Constitution confers on this Court "to issue all writs . . . as may be required to exercise control of the Court of Justice" in order to prevent injustice. Ky. Const. § 110(2)(a).

Although the Court of Appeals recognized the obvious injustice associated with such a narrow interpretation of Kentucky law in this case, it nonetheless believed that it was up to this Court to decide whether this case fits within its writ authority. (*See* 2/28/14 Op. at 2-4, 9-13.) Purdue submits that the special circumstances here already fit within the principles expressed in prior Kentucky cases like *Kentucky Farm Bureau*, *Jackson*, and *Merck*, in which this Court recognized that immediate writ review is appropriate in certain extreme situations where interlocutory orders unfairly skew the proceedings either by effectively ending the case or by placing one of the litigants in what amounts to a "no win" situation. Both those Kentucky cases and the cases cited by the Court of Appeals involved interlocutory orders that so impacted the entire course of the litigation that they created risks to the aggrieved party no litigant reasonably should have to tolerate. The Circuit Court's orders, under the circumstances here, fit within that limited group of extraordinarily disruptive orders and, thus, warrant a writ. But if this Court deems that a writ here would require it to extend Kentucky law, it should exercise its unique authority to do so. As the Court of Appeals implicitly found, if there ever was a case that justified such an extension, it is this one.

VI. The Circuit Court's Orders Were Abuses of Discretion That, If Left Uncorrected, Will Result in a Substantial Miscarriage of Justice

A. The Order Deeming the Requests Admitted Was Erroneous

In its April 1, 2013 order deeming the requests for admissions to be admitted, the Circuit Court appears to have applied a rule that is not found in the Civil Rules or Kentucky case law. Through this order, the Circuit Court harshly punished Purdue for failing to follow this previously-unannounced rule and did so without giving Purdue

notice or an opportunity to be heard. In this way, the Circuit Court not only made bad law but did so in a way that is manifestly unjust.

The effect of removal on discovery served in state court and pending at the time of removal is clear, and undisputed here, at least while the case remains in federal court. (*See* Ex. 6, Sept. 25, 2013 Hrg. Tr. at 35; Ex. 7, Com.'s Reply on Mot. to Deem Admitted at 2.) Federal Rule of Civil Procedure 26(d) prohibits any discovery until after the parties confer on a discovery plan. This means that parties may not "continue to seek discovery which may have been properly served under state law rules pre-removal." *Riley v. Walgreen Co.*, 233 F.R.D. 496, 499 (S.D. Tex. 2005). Thus, "[d]iscovery served in state court becomes ***null and ineffective*** upon removal." *Wilson v. Gen. Tavern Corp.*, No. 05-81128 CIV RYSKAMP, 2006 WL 290490, at *1 (S.D. Fla. Feb. 2, 2006) (emphasis added); *see also, e.g.*, *Steen v. Garrett*, No. 2:12-cv-1662-DCN, 2013 WL 1826451, at *2-*3 (D.S.C. Apr. 30, 2013) (same; collecting cases).

But no Kentucky rule or case addresses whether (or under what circumstances) state court discovery that is rendered "null and ineffective" under federal law upon removal, becomes "effective" again upon remand. This is a question of first impression.

The Circuit Court apparently found that, after remand, pre-removal requests should regain their effectiveness automatically, without any re-service or notice to the other party that responses are requested. That "rule" creates confusion and unfairness. For example, neither the Circuit Court nor the Commonwealth ever identified ***when*** the clock for responding restarts after remand or ***what*** the actual response deadline would be. Indeed, it is unclear what event would restart the clock. Would it be: (1) the date the federal court first orders remand (here, September 26, 2011, although the remand order

quickly was stayed by the federal Second Circuit Court of Appeals, pending appeal, until February 1, 2013); (2) the date the federal court sends back the case record (here, February 4, 2013); or (3) the date the state court receives it (here, February 8, 2013)?

Nor is it clear whether a new response period automatically would start over upon remand, or whether the responding party would have only however many days remained as of the date of removal. Would requests initially served with the complaint, as in this case, be subject to a continuation of the initial 45-day response period or a new response period of either 45 or 30 days? *See* CR 36.01(2). And if the response clock simply resumes, what happens if the parties do not receive notice of the triggering remand event until after the response deadline has passed (*i.e.*, because perhaps there was very little – or no – time remaining to respond at the time of removal)?

No Kentucky authority answers these nettlesome questions. Neither did the Circuit Court or Commonwealth. Without clear answers to each of these questions, the odds that the responding party unknowingly will overlook a deadline and "admit" what it actually denies are unacceptably high. This is fundamentally unfair and entirely at odds with the purpose of CR 36.

A better approach would be to require the party propounding the requests either to re-serve them after remand or, at the very least, to provide notice to the other party that responses are requested so that the parties can agree upon a response deadline. This common-sense rule would avoid all of the confusion and unfairness inherent in the approach the Circuit Court apparently followed. It also would encourage open communication between the parties and avoid the need for court involvement, both goals of the discovery rules. *See* 6 Kurt A. Philipps, Jr., *Kentucky Practice*, CR 26.02, cmt. 3

(6th ed. 2012) ("In order for discovery to proceed efficiently, counsel must cooperate without day to day supervision by the court.").

Moreover, that approach promotes the fundamental truth-seeking function of the discovery process by discouraging "gotcha" litigation. *See id.* ("The Supreme Court recognizes that discovery is an important tool in litigation that should be a search for truth."). It also advances Kentucky's strong policy that "every cause of action should be tried upon the merits," *Childress v. Childress*, 335 S.W.2d 351, 354 (Ky. 1960),[17] and not decided "because of a missed deadline," a basis that "does not further the interests of justice," *Burns-Mahanes v. Loeb*, No. 2004-CA-002195-MR, 2005 WL 2241043, at *3 (Ky. App. Sept. 16, 2005). (unpub.). *See also Duncan v. Norton Suburban Hosp.*, No. 2003-CA-001039-MR, 2004 WL 912136, at *3 (Ky. App. Apr. 30, 2004, *as modified*, July 9, 2004) (unpub.) ("Indeed, we can hardly say that the interests of justice are furthered by having dispositive issues decided by way of a missed deadline."). That approach ensures that the parties have clear notice of important deadlines in a context where they otherwise would be left guessing. Under this approach, Purdue missed no response deadline, and the Circuit Court erred in deeming the requests admitted.

But even were this Court to adopt the Circuit Court's apparent approach, the fact that the Circuit Court applied it against Purdue ***without any prior notice of what the rule is, or even an opportunity to be heard*** before the requests were deemed admitted,

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[17] *See also, e.g.*, *Mullins v. Com.*, 262 S.W.2d 666, 667 (Ky. 1953) ("the policy of the law is to have every litigated case tried on its merits"); *Dressler v. Barlow*, 729 S.W.2d 464, 465 (Ky. App. 1987) (same); *accord* Fed. R. Civ. P. 36(b) advisory committee notes (1970) (deemed admissions withdrawal provision "emphasizes the importance of having the action resolved on the merits").

violated Purdue's due process rights.[18] U.S. Const. amend. XIV; Ky. Const. § 2; *Parrish v. Claxon Truck Lines*, 286 S.W.2d 508, 512 (Ky. 1955) ("due process of law" requires "reasonable notice and opportunity to be heard according to ***regular and established rules of procedure***" (emphasis added)); *see also City of Louisville v. Slack*, 39 S.W.3d 809, 812 (Ky. 2001) ("'It is an established rule that an enactment accords due process of law, if it affords a method of procedure ***with notice***, and operates on all alike.'" (emphasis added; citation omitted)).

In short, this Court's intervention is necessary not only to prevent a substantial miscarriage of justice but to declare what the law is and provide future litigants in Kentucky with the guidance they need to avoid what otherwise will remain a potentially fatal trap for the unwary. *See CSX Transp., Inc. v. Ryan*, 192 S.W.3d 345, 348 (Ky. 2006); *Sexton v. Bates*, 41 S.W.3d 452, 455 (Ky. App. 2001).

B. The Circuit Court Erred Again by Denying Purdue's CR 36.02 Motion to Withdraw or Amend Deemed Admissions

The Circuit Court's order refusing to allow Purdue (yet, inexplicably, permitting Abbott) to withdraw the deemed admissions constitutes a second significant error. The Court of Appeals, in three unpublished decisions over the past decade, has held clearly that it is an abuse of discretion to deny a motion to withdraw deemed admissions pursuant to CR 36.02 where a deadline allegedly was missed at the preliminary stage of

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[18] Purdue's approach avoids these due process concerns and, therefore, comports with the canon of constitutional avoidance. *See United States v. Rumely*, 345 U.S. 41, 45 (1953) ("'if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided'" (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932); constitutional avoidance approach is "decisive in the choice of fair alternatives")); *cf. Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559 (2011) (interpreting procedural rule to avoid possibility of due process violation from lack of notice).

the case, a point at which no prejudice possibly could result to the party that had obtained the admission. *Bowland v. Gardner,* No. 2008-CA-000136-MR, 2009 WL 2408345, at *2-*3 (Ky. App. Aug. 7, 2009) (unpub.); *Burns-Mahanes v. Loeb*, No. 2004-CA-002195-MR, 2005 WL 2241043, at *3-*4 (Ky. App. Sept. 16, 2005) (unpub.); *Duncan v. Norton Suburban Hosp.*, No. 2003-CA-001039-MR, 2004 WL 912136, at *2-*3 (Ky. App. Apr. 30, 2004, *as modified*, July 9, 2004) (unpub.) Federal cases are in accord. *See, e.g.*, *Perez v. Miami-Dade County*, 297 F.3d 1255, 1265-68 (11th Cir. 2002) (finding abuse of discretion to deny motion to withdraw admissions where the two Rule 36(b) factors were met); *FDIC v. Prusia*, 18 F.3d 637, 640-41 (8th Cir. 1994) (same).[19]

Here, the Circuit Court ***wholly ignored the three cases from Kentucky appellate courts*** construing and applying the standard for withdrawal under CR 36.02. The Circuit Court's order demonstrates that, despite the Court of Appeals's clear rulings in unpublished decisions, Kentucky trial courts are still in need of additional, authoritative guidance because there is no ***reported*** Kentucky authority interpreting and applying the withdrawal/amendment component of CR 36.02. *See, e.g.*, *Sisters of Charity Health Sys., Inc. v. Raikes*, 984 S.W.2d 464, 466-67 (Ky. 1998) (considering merits of writ petition where "the issue continues to be litigated again and again," "[d]espite five Published cases"); *Ryan*, 192 S.W.3d at 348; *Sexton*, 41 S.W.3d at 455.

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[19] "Because Kentucky's CR 36.02 is substantially the same as its federal counterpart, FRCP 36(b)," Kentucky courts "may look to federal cases for guidance in this area." *Burns-Mahanes*, 2005 WL 2241043, at *3; *see Duncan*, 2004 WL 912136, at *2 n.2 ("Fed.R.Civ.P. 36(b) is substantially similar to Ky. R. Civ. P. 36.02.").

1. The Circuit Court Failed Even to Cite, Much Less Apply, the Two Factors Required by CR 36.02

The error below is patent. This Court has instructed that "[a] request for admissions should be used to obtain the admission of facts about which there is not real dispute," and "should not be used as a means of covering the entire case." *Lewis v. Kenady*, 894 S.W.2d 619, 621 n.2 (Ky. 1994) (citations omitted). To preserve the rule's core housekeeping function and to ensure that disputed issues are decided on the merits, CR 36.02 allows withdrawal or amendment of deemed admissions

> when [1] the presentation of the merits of the action will be subserved thereby and [2] the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.

CR 36.02; *see Herrin v. Blackman*, 89 F.R.D. 622, 624 (W.D. Tenn. 1981) ("The purpose of Rule 36 is to remove uncontested issues and to prevent delay and therefore when the issues going to the merits are contested and the late response does not cause delay of a trial or prejudice to a litigant, there is no reason to refuse a late filing.")

The withdrawal provision exists to ensure that CR 36 retains its function as "a time-saver, designed 'to expedite the trial and to relieve the parties of the cost of proving ***facts that will not be disputed at trial***.'" *Perez*, 297 F.3d at 1268 (citation omitted; emphasis in original). CR 36 is ***not*** meant to ensnare or punish parties in a way that unfairly resolves fundamental disputed issues that the party never meant to concede. As the Court of Appeals has made clear in cases involving missed response deadlines, "***we can hardly say that the interests of justice are furthered by having dispositive issues decided by way of a missed deadline***." *Duncan*, 2004 WL 912136, at *3 (emphasis added); *see Burns-Mahanes*, 2005 WL 2241043, at *3 (same; quoting *United States v. $30,354.00 in U.S. Currency*, 863 F. Supp. 442, 445 (W.D. Ky. 1994)); *Scott v. Garrard*

County Fiscal Court, No. 5:08-CV-273-JMH, 2012 WL 619230, at *2 (E.D. Ky. Feb. 24, 2012) ("Rule 36(b) underscores the importance of resolving an action on the merits, while avoiding prejudice to the requesting party"); Fed. R. Civ. P. 36(b) advisory committee notes (1970) (withdrawal provision "emphasizes the importance of having the action resolved on the merits").

As is clear on the face of the rule, the ***only*** factors that a court may consider under CR 36.02 are whether withdrawal would promote presentation of the case on the merits and whether the other party can show prejudice. *Burns-Mahanes*, 2005 WL 2241043, at *3-*4 (quoting *Prusia*, 18 F.3d at 640); *see Perez*, 297 F.3d at 1265 (a trial court "abuses its discretion under Rule 36(b) in denying a motion to withdraw or amend admissions ***when it applies some other criterion beyond the two-part test***" (emphasis added)).

Here, the Circuit Court made no findings at all, either in its order or at the hearing, that withdrawal or amendment would prejudice the Commonwealth or would not serve presentation of the merits. The Court of Appeals ***has found the omission of these findings, or the absence of any sign that the trial court considered the mandatory factors, alone to be enough to constitute an abuse of discretion***. *Duncan*, 2004 WL 912136, at *3 (reversing denial of leave to withdraw admissions where "the circuit court did not make a finding of prejudice as required under CR 36.02 and failed to consider if the merits of the case would be subserved by amendment as also required under CR 36.02"). Given the Circuit Court's failure even to mention CR 36.02 or the critical factors of "prejudice" or "presentation of the merits" in its order or at the hearing, there is no evidence that the Circuit Court applied the CR 36.02 standard at all. That alone demonstrates the Circuit Court's abuse of its discretion and constitutes reversible error.

2. The CR 36.02 Factors Strongly Support Withdrawal or Amendment

a. Permitting Withdrawal Will Promote Presentation of the Case on the Merits

Allowing withdrawal of the deemed admissions unquestionably would promote presentation of the case on the merits. (*See* App. A, 2/28/14 Op. at 9 ("The damaging effect of the admissions is undeniable.").) The Commonwealth's recent motions for summary judgment as to liability and for a trial only on damages now make the threat that the deemed admissions could preclude presentation on the merits all the more clear.

The deemed admissions address important issues. They are sharply contested and, in many cases, flatly untrue. Preventing Purdue from challenging them would frustrate, rather than "subserve," presentation of the case on the merits, resulting in a trial based on legal "fictions" and the absurd result of deeming as true:

- ***Allegations that are flatly untrue***: Contrary to Admission No. 15, for instance, Purdue ***has*** developed an abuse-deterrent re-formulation of OxyContin that has been on the market since August 2010.[20] (Resp. to Admission No. 15.) Similarly, although Admission No. 25 states that OxyContin "occupied a majority of the market share for prescription painkillers" between 1995 and 2006, in fact, OxyContin never has represented more than a fraction of 1% of the United States market "for prescription painkillers."

- ***Allegations that other courts have found to be untrue***: Although Admission No. 16, for example, states that Purdue "did not warn the general public or practitioners of the true and actual addictive potential of OxyContin," courts in Kentucky and other courts disposing of claims of Kentucky plaintiffs have found that Purdue ***did*** provide warnings that "clearly set forth the potential dangers of the drug and the best manner in which to minimize those dangers." *Foister v. Purdue Pharma L.P.*, 295 F. Supp. 2d 693, 708 (E.D. Ky. 2003); *see Wethington v. Purdue Pharma L.P.*, 218 F.R.D. 577, 589 (S.D. Ohio 2003).

- ***Allegations that no plaintiff has been able to establish in 13 years of OxyContin litigation***: Admission No. 18 states that Purdue's "misrepresentations and/or

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[20] (*See* Ex. 28, Douglas C. Throckmorton, M.D., *The Science of Abuse-Deterrence – Progress Toward Creating Safer Opioids*, FDA Voice (Apr. 16, 2013) (discussing the reformulated version of OxyContin's abuse-deterrent properties).)

> omissions . . . caused damage" to the Commonwealth, but the court presiding over Purdue's criminal plea noted that, in OxyContin civil litigation, "[c]ourts have consistently found that despite extensive discovery, plaintiffs were ***unable to show that Purdue's misbranding proximately caused their injuries***." *United States v. Purdue Frederick Co.*, 495 F. Supp. 2d 569, 575 (W.D. Va. 2007) (collecting cases; emphasis added); *see also Foister*, 295 F. Supp. 2d at 703-04 (granting summary judgment for lack of causation); *Foister v. Purdue Pharma L.P.*, No. 01-268-JBC, 2001 U.S. Dist. LEXIS 23765, at *27 (E.D. Ky. Dec. 27, 2001) (Kentucky plaintiffs "have failed to produce any evidence showing that the defendants' marketing, promotional, or distribution practices have ever caused even one tablet of OxyContin to be inappropriately prescribed or diverted.").

CR 36.02 was meant to avoid, not foster, verdicts based on deemed "facts" like these that are incontrovertibly false and never have been proven. *See, e.g.*, *Prusia*, 18 F.3d at 641 (abuse of discretion to deny motion to amend admissions where "the record demonstrates that the 'admitted' facts are contrary to the actual facts"). In short, this first part of the CR 36.02 test is satisfied.

b. The Commonwealth Did Not Meet its Burden of Showing Prejudice

The second prong of the two-part test imposes a burden on the Commonwealth, as the party that obtained the deemed admissions, to prove that withdrawal or amendment would cause it prejudice. *Duncan*, 2004 WL 912136, at *2 (quoting 6 Kurt A. Philipps, Jr., *Kentucky Practice*, CR 36.02 (5th ed. 1995)); *see Bowland*, 2009 WL 2408345, at *2; *Burns-Mahanes*, 2005 WL 2241043, at *3 (citing *Prusia*, 18 F.3d at 640). In the context of CR 36.02, "prejudice" does not mean having to go to the time, effort, and expense of proving a party's case. Instead, it "relates to the difficulty a party may face in proving its case because of the ***sudden need*** to obtain evidence required to prove the matter that had been admitted." *Burns-Mahanes*, 2005 WL 2241043, at *3 (quoting *Prusia*, 18 F.3d at 640) (emphasis added); *Kerry Steel, Inc. v. Paragon Indus., Inc.*, 106 F.3d 147, 154 (6th

Cir. 1997) (Rule 36 prejudice "is not simply that the party who initially obtained the admission will now have to convince the fact finder of its truth" (quotation omitted)).

The Court of Appeals essentially found that Purdue's request to withdraw the deemed admissions was "***without any prejudice caused to the Commonwealth***." (2/28/14 Op. at 10 (emphasis added).) In fact, at oral argument in the Court of Appeals, the Attorney General effectively conceded the point:

> JUDGE THOMPSON: All right. Let's go to prejudice for the Commonwealth. You've got 11 days between the time the admissions were due and the time the answers were tendered. What prejudice did the Commonwealth incur during those 11 days?
>
> ATTORNEY GENERAL CONWAY: During those 11 days, ***it's difficult to say exactly and pinpoint what the prejudice was***.
> . . .
> The prejudice – ***I can't say that in 11 days that, okay, that all of a sudden there's this insurmountable prejudice*** . . . .

(App. F, 2/11/14 Oral Arg. Tr. at 29-30, VR 09:29:13-09:30:07 (emphasis added).) And the Circuit Court did not make any express finding of prejudice or identify what the supposed prejudice might be. (App. C, Sept. 25, 2013 Order.) In any event, the record is clear that the Commonwealth failed to show the requisite prejudice to meet its burden.

i. *It was far too early in the development of the case for withdrawal to cause prejudice*

The Court of Appeals has stated that it "***cannot envision any prejudice*** caused to [a party] by a late filing of the admissions ***at the preliminary stage of the case***." *Bowland*, 2009 WL 2408345, at *2 (emphasis added); *see also Clark v. Johnston*, 413 F. App'x 804, 819 (6th Cir. 2011); *Robertson v. City of Memphis*, No. 02-267 MAV, 2004 WL 2905398, at *2 (W.D. Tenn. June 7, 2004). That is the case here.

Even though it was filed in 2007, this case was still in its preliminary stages when the Circuit Court rejected Purdue's CR 36.02 motion. Discovery was just beginning, and

the parties were only discussing the exchange of documents. Still today, no depositions have been noticed or taken, no experts have been disclosed, and no trial date or discovery deadline is imminent or even has been set.[21] The Commonwealth had – and still has – ample time and ability to take all of the discovery it needs to try its case on the merits. Withdrawal of the deemed admissions would not have left the Commonwealth with a "sudden need" to scrounge for evidence at the last minute to prove the matters addressed in the deemed admissions. ***On the contrary, withdrawal would have left the Commonwealth in exactly the same position in which it would have been had Purdue met the alleged "deadline."*** Thus, "aside from being deprived of a premature triumph in the lawsuit," the Commonwealth simply has not shown, and cannot show, prejudice had the deemed admissions been withdrawn. *Piggee v. Columbia Sussex Corp.*, No. 2:08–CV–107–PPS–PRC, 2010 WL 4687725, at *6 (N.D. Ind. Nov. 10, 2010); *see Butler v. PP&G, Inc.*, No. WMN–13–430, 2013 WL 4026983, at *3 (D. Md. Aug. 6, 2013) (allowing withdrawal, where "discovery has not yet closed" and, thus, the requesting party "still has the opportunity to gather evidence in support of her case").

ii. *The Commonwealth could not and did not justifiably rely on the deemed admissions*

Additionally, prejudice sufficient to prevent withdrawal or amendment can arise only from ***justified reliance*** on the deemed admissions themselves. *See* Fed. R. Civ. P. 36(b) advisory committee notes (1970) (provision for withdrawal or amendment "assure[s] each party that ***justified reliance*** on an admission in preparation for trial will

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[21] In fact, the admissions related motions and the Commonwealth's recently-filed motions for summary judgment on liability and a damages-only trial are the only substantial events that have taken place in Pike Circuit Court. Otherwise, this case essentially still is in the same preliminary posture.

not operate to his prejudice" (emphasis added)); 8B Wright & Miller, *Federal Practice & Procedure: Civil* § 2264 (3d ed. 2010) ("The reference to 'prejudice' in Rule 36(b) is to the prejudice stemming from ***reliance*** on the binding effect of the admission." (emphasis added)); *Piggee*, 2010 WL 4687725, at *6 (same); *Kress v. Food Employers Labor Relations Ass'n*, 285 F. Supp. 2d 678, 681 (D. Md. 2003) (same; quoting Wright & Miller), *aff'd*, 391 F.3d 563 (4th Cir. 2004); *White Consol. Indus., Inc. v. Waterhouse*, 158 F.R.D. 429, 433 n.5 (D. Minn. 1994) (same). Justified reliance occurs when a party "has relied upon admissions by concluding that documentary evidence or witnesses need not be presented as to those admitted matters, ***and*** when there is insufficient time before trial for that party to obtain the necessary evidence or witnesses." *Ropfogel v. United States*, 138 F.R.D. 579, 584 (D. Kan. 1991) (emphasis added).

Here, the Commonwealth has not met its burden of proving that it ***justifiably*** took any significant action, or refrained or was prevented from obtaining material evidence, ***in reliance*** on the deemed admissions ***within the brief period*** between the time Purdue's responses allegedly were due in February or March 2013 and the filing of Purdue's actual responses in April of 2013.

First, the delay between any response deadline and Purdue's actual responses and CR 36.02 motion was *de minimis*. Even the Commonwealth agrees that Purdue had no obligation to respond to the requests at least until some unidentified date in February or March 2013. (*See* Ex. 18, Mot. to Deem Admitted at 5.) Purdue filed its April 12, 2013 responses only 11 days after learning that the Commonwealth considered the responses late, and then it moved to withdraw any deemed admissions on April 29, 2013. The Commonwealth could not justifiably have relied on Purdue's admissions during that

narrow window and, as noted above, conceded at much at oral argument in the Court of Appeals. (App. F, 2/11/14 Oral Arg. Tr. at 29-30, VR 09:29:13-09:30:07); *see Bowland*, 2009 WL 2408345, at *2 (finding no prejudice, and allowing responses, when responses provided "promptly" after notice that they were late); *Medtronic Sofamor Danek, Inc. v. Michelson*, No. 01-2373 MLV, 2004 WL 179310, at *3 (W.D. Tenn. Jan. 2, 2004) (granting motion to withdraw admissions where parties responded quickly after failure to respond brought to their attention).

Second, the Commonwealth could not justifiably have relied on the deemed admissions because it long has known that Purdue denies or contests a great number of the requests from Purdue's denials of substantially similar allegations in its 2007 answers to the complaint. Moreover, in January 2011 – more than two years before responses to the requests supposedly were due – Purdue sent the Commonwealth a lengthy memorandum explaining why the Commonwealth could not meet its burden of proving causation, either legally or factually. (*See* Ex. 6, Sept. 25, 2013 Hrg. Tr. at 18.)

Thus, the Commonwealth could not justifiably have believed that the deemed admissions reflected Purdue's actual position or that Purdue intended to admit them. *See Perez*, 297 F.3d at 1267-68 (finding no prejudice because defendant had "den[ied] the allegations of the complaint," so plaintiff "knew from the very beginning . . . that he would have to prove many of the elements of his case now deemed admitted"); *Cahall v. Big Bear Stores Co.*, 802 F.2d 456, 1986 WL 17467, at *5 (6th Cir. Aug. 27, 1986) (table) (affirming withdrawal of admission where party "in its answer specifically denied" the allegation, "thus putting [plaintiff] on notice that it denied the charge"); *Bell v. Konteh*, 253 F.R.D. 413, 416 (N.D. Ohio 2008) (same); *American Petro, Inc. v.*

Shurtleff, 159 F.R.D. 35, 38 (D. Minn. 1994) (same); *Medtronic Sofamor Danek*, 2004 WL 179310, at *1 (same); *see also Herrin*, 89 F.R.D. at 624 ("there could be no good faith reliance on the lack of a response to the request for admissions" because requesting party "had been informed by counsel" that the requests "would be denied").

iii. *Nothing identified by the Commonwealth even arguably constitutes prejudice under CR 36.02*

None of the supposed prejudice the Commonwealth has attempted to identify qualifies under CR 36.02. The Commonwealth argued that it might be prejudiced because "evidence that may have existed or been obtainable five and a half years ago may not be so obtainable in 2013." (Ex. 7, Com.'s Reply on Mot. to Deem Admitted at 15.) But as even the Commonwealth recognizes, Purdue had no obligation to respond to the requests for admissions until at least February or March 2013, after the case was remanded from federal court. The Commonwealth could not possibly have been relying on any deemed "admissions" before even it believed responses were due. And the Commonwealth has identified no evidence that supposedly was lost between February or March 2013 and April 12, 2013, the only period in which justifiable reliance even arguably could have been possible.

The Commonwealth further speculated that Purdue might attempt to avoid admissions that it made in 2007 in connection with a federal criminal plea in Virginia, which the Commonwealth contends tracks its own requests for admissions. (*See id.* at 15; Sept. 25, 2013 Hrg. Tr. at 28-29; Agreed Statement of Facts, attached as Exhibit A to First Am. Compl. (Ex. 4).) This concern is misplaced. First, to the extent the plea admissions overlap with the Commonwealth's requests (and the allegations in its complaint), Purdue expressly has admitted those parts of the requests, so the

Commonwealth will not need to re-prove allegations covered by the plea. (*See, e.g.*, App. E, Purdue's RFA Resp. Nos. 5-6, 8, 16; Ex. 10, Purdue Answers.)

Moreover, the Commonwealth's requests go much further than the admissions in Purdue's plea. (*Compare* App. D, Plfs.' Requests for Admissions, *with* Agreed Statement of Facts.) As a notable example, the plea admissions do not touch on the causation issues raised in the Commonwealth's requests. Indeed, the federal court accepting Purdue's plea expressly held that putative civil claimants like the Commonwealth still would have to prove independently that they were "'directly and proximately' harmed by the misbranding offense that was the subject of the plea agreements" before they could recover from Purdue. *United States v. Purdue Frederick Co.*, 495 F. Supp. 2d 569, 574-75 (W.D. Va. 2007); *see Boysaw v. Purdue Pharma*, No. 1:07CV00079, 2008 WL 2076667, at *2 (W.D. Va. May 16, 2008) (same court holding, in separate action, that "[d]espite the plaintiff's contention that the defendants' guilty pleas for the misbranding of OxyContin amount to an admission of liability in the instant action," it "cannot infer without additional proof that OxyContin was the proximate cause of the plaintiff's injuries"). And as noted above, no plaintiff has been able to prove causation in 13 years of OxyContin product liability litigation.

Finally, at the Circuit Court hearing, the Commonwealth asserted for the first time that the August 2, 2013 death of Howard Udell, Purdue's former General Counsel, would cause it prejudice if the admissions were withdrawn because he is no longer available as a witness. (Ex. 6, Sept. 25, 2013 Hrg. Tr. at 31-33, 47.) This is a red herring. Mr. Udell died months ***after*** the Commonwealth explicitly was on notice of Purdue's denials of the requests for admissions. Indeed, his death occurred some four months ***after*** Purdue filed

its responses to the requests for admissions, and ***after*** the briefing on the admissions-related motions was complete. In other words, Mr. Udell died long after the period in which the Commonwealth even theoretically could claim that it justifiably was relying on the deemed admissions. The Attorney General conceded this at oral argument before the Court of Appeals. (App. F, 2/11/14 Oral Arg. Tr. at 29, VR 09:29:13-09:29:36.) Thus, the fact that Mr. Udell died months after Purdue filed its April 12, 2013 responses has no bearing on the prejudice inquiry. *See Perez*, 297 F.3d at 1267 n.26 (rejecting claim of prejudice arising from death of a key witness (one of the defendants) months ***after*** the late responses to requests for admissions and filing of a motion to withdraw deemed admissions because the "prejudice inquiry" must focus on whether harm to the requesting party arose ***prior*** to service of the responses and filing of the motion to withdraw).

In short, the Commonwealth utterly has failed to meet its burden of establishing prejudice under CR 36.02.

C. The Circuit Court Further Underscored Its Error By Arbitrarily Denying Purdue's Motions While Granting Abbott's Nearly Identical Motions

At the same time that it denied Purdue's motions to rescind the order deeming the requests admitted and to withdraw any deemed admissions, the Circuit Court, without explanation, also ***granted*** Abbott's nearly identical motions. The Circuit Court did so, despite the facts that: Purdue and Abbott both received the same requests for admissions at the same time; both joined in the removal of the case; both jointly asked the Circuit Court to rescind its order deeming the requests admitted; both promptly filed responses to the requests when the Commonwealth moved to have them deemed admitted; both soon thereafter filed oppositions to the Commonwealth's motion and alternative motions to withdraw or amend any deemed admissions, which included virtually identical legal

arguments; and both defendants' counsel received the same letters from the Commonwealth suggesting they had committed malpractice.

Yet the Circuit Court offered no justification, in its order or at the hearing, for its inconsistent treatment of Purdue and Abbott. Indeed, the Commonwealth argued in the Circuit Court that Abbott should receive the same treatment as Purdue and filed nearly identical briefs in response to Purdue and Abbott's oppositions to the motion to deem admitted and motions to withdraw or amend. (*Compare* Ex. 29, Com.'s Reply to Abbott's Resp. on Mot. to Deem Admitted, *with* Ex. 7, Com.'s Reply to Purdue's Resp. on Mot. to Deem Admitted.) Moreover, the orders contradict themselves. For example, because it granted Abbott's motion to rescind the deeming order, the Circuit Court ***must have found that Abbott did not miss its response deadline***. But ***if that is true, then Purdue***, which filed responses even before Abbott did, ***did not miss a deadline either***. And, as to the CR 36.02 motions, if the Commonwealth did not meet its burden of opposing withdrawal as to Abbott, the same also must be true as to Purdue. In short, the difference in treatment between Purdue and Abbott underscores the Circuit Court's errors because it defies explanation and is contrary to the parties' conduct and arguments.

CONCLUSION

This case is a "perfect storm" of unique, egregious circumstances that, without a writ, will harm Purdue and orderly judicial administration in an exceptionally unjust way:

- The Circuit Court invented a new rule of procedure, appearing nowhere in Kentucky law, to find that Purdue (but ***not*** Abbott) missed a deadline for responding to pre-removal requests for admissions after remand from federal court;
- It applied that rule harshly, without giving Purdue notice or an opportunity to be heard, to deem admitted the highly significant and sharply disputed requests, which the Commonwealth now claims to be dispositive of liability;

- It erred again by summarily denying Purdue's CR 36.02 motion, despite how critical the admissions could be to presentation of the merits and the complete absence of prejudice to the Commonwealth during the brief period between the supposed "deadline" and service of Purdue's actual responses;

- It deemed "admitted" allegations that Purdue denied in its answers to the complaint and that either are indisputably false or have been rejected expressly by other courts in Kentucky;

- It inexplicably granted co-defendant Abbott's legally-indistinguishable motions;

- It created a situation in which post-judgment appeal could not provide adequate relief because:

    - The risk of a record-setting verdict sought by the Commonwealth after a trial in which Purdue could not meaningfully defend itself imposes intense pressure on Purdue to settle, and waive any appeal, but only after the erroneous rulings have skewed the negotiations unfairly; and

    - Even if Purdue endures the risk of an unfair trial – based on false "admissions" and without the ability to defend itself fully on the merits – and incurs the precedent-setting verdict predicted by the Commonwealth just to attain the ability to appeal, any re-trial would be infected by what is sure to be a widely-held understanding that Purdue had "admitted" to causing the Commonwealth massive damages, only to have that verdict overturned on a legal technicality – an error-tainted judgment that, in this exceptional case, would be a bell no appeal could unring; and

- The Court of Appeals, while finding Purdue's arguments for a writ "compelling" and stating that it was "inclined" to follow Kentucky's sister state courts' reasoning and grant relief, believed (albeit mistakenly) that it was powerless under existing Kentucky law to issue a writ.

Only this Court can intervene and ensure fairness and orderly judicial administration. Accordingly, Purdue respectfully requests that this Court grant a writ (1) directing the Circuit Court (a) to rescind its order deeming the requests for admissions admitted and accept Purdue's tendered responses, and/or (b) to grant Purdue's motion to withdraw or amend deemed admissions pursuant to CR 36.02 and allow substitution of Purdue's tendered responses, or, at a minimum, (2) prohibiting the Circuit Court from enforcing its order deeming the Commonwealth's requests for admissions admitted.

Dated: April 25, 2014

Respectfully submitted,

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EVIDENTIARY APPENDIX

IN SUPPORT OF THE BRIEF OF APPELLANTS

INDEX TO EVIDENTIARY APPENDIX

APPENDIX

[1] On April 18, 2014, the Court of Appeals of Kentucky ordered that the DVD of the February 11, 2014 oral argument on Purdue's writ petition be made a part of the official case record. To aid the Court in its review, pursuant to CR 98(4)(b), Purdue is attaching hereto the cited excerpts of the written transcript of that oral argument.